

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Zoning Commission



ZONING COMMISSION ORDER NO. 12-02A
Z.C. Case No. 12-02A
50 Florida Avenue Development Associates, LLC
(Modification of Consequence of PUD @ Square 3516, Lots 134 and 138)
July 29, 2019

Pursuant to public notice, the Zoning Commission for the District of Columbia (the “Commission”) held a public meeting on July 29, 2019 at which the Commission considered the application of 50 Florida Avenue Development Associates, LLC (the “Applicant”) for a Modification of Consequence (the “Application”) of the consolidated planned unit development (a “PUD”) approved by Z.C. Order No. 12-02 (the “Original Order”) for Lots 134 and 138 in Square 3516 (the “PUD Site”). The Commission reviewed the Application pursuant to the Commission’s Rules of Practice and Procedures, which are codified in Subtitle Z of Title 11 of the District of Columbia Municipal Regulations (the “Zoning Regulations,” to which all subsequent citations refer unless otherwise specified). For the reasons stated below, the Commission **APPROVES** the Application.

FINDINGS OF FACT

Background

1. Pursuant to the Original Order, effective November 29, 2013, the Commission approved a PUD with a related map amendment from the C-2-A and C-M-2 Zone Districts to the C-3-B Zone District to authorize the construction of a building (the “Building”) with a maximum height of 90 feet and a floor area ratio (“FAR”) of 4.83 that included 196,029 square feet of residential use over 182 units, and 7,858 square feet of retail uses with a 1,382-square-foot plaza that could be used for an outdoor café.
2. The PUD Site is located between Florida Avenue, N.E. to the south and a 16-foot-wide public alley to the north, with private properties on its east and west, and is bisected by a 12-foot-wide public alley running north to south separating Lots 134 and 138. The PUD Site has a land area of approximately 42,223 square feet.
3. Condition B.4. of the Original Order required that:

Prior to the issuance of a certificate of occupancy for the building, the Applicant shall submit to the Department of Consumer and Regulatory Affairs (“DCRA”) evidence that:

- a. *The Applicant provided \$220,000 to Cultural Tourism DC for the development and installation of eight signs for an Eckington Heritage Trail in the neighborhood;*
- b. *The Applicant paid a contractor or otherwise incurred costs of \$65,000 for the fabrication and installation of three-sided perimeter tree enclosures ("commonly referred to as "tree boxes") and mulch at the locations on the north and south sides of Q Street and R Street, N.E. between North Capitol Street and Eckington Street; and*
- c. *The eight heritage trail signs have been installed or are in the process of being developed and that the tree boxes and mulch have been installed.*

The Application

4. By a letter dated April 25, 2019, the Applicant submitted the Application requesting that Condition B.4. of the Original Order be modified to allow the installation of fewer tree boxes due to the unanticipated need for a maintenance covenant from the adjacent property owner for each tree box, which would require 65 individual covenants. The need for these maintenance covenants had not been anticipated at the time of the Original Order.
5. The Application proposed that the shortfall in expenditures on the tree boxes would be allocated instead to funding additional signs from Cultural Tourism DC for the Eckington Heritage Trail in the neighborhood of the PUD Site, so that the total disbursement of funds remain the same.
6. The Applicant served the only other parties to the Original Order, Advisory Neighborhood Commission ("ANC") 5E and Kimberly Konkell, as attested by the Certificate of Service submitted with the Application. (Exhibit ["Ex."] 1, p. 5.)
7. ANC 5E submitted a resolution that was adopted by a vote of the ANC at its duly noticed public meeting held on June 18, 2019, with a quorum of nine out of 10 Commissioners present (the "ANC Resolution"). The ANC Resolution noted that "approval of this revised language will enable the developer to obtain a Certificate of Occupancy for the building in a timely manner, while still working with the ANC and residents to ensure delivery of the amenities for the project." (Ex. 2)
8. Ms. Konkell did not file a response to the Application.
9. The Office of Planning ("OP") submitted a report dated June 28, 2019 agreeing that the Application qualified as a Modification of Consequence and recommending approval of the Application (the "OP Report"). (Ex. 4.)

CONCLUSIONS OF LAW

1. Subtitle Z § 703.1 authorizes the Commission, in the interest of efficiency, to make Modifications of Consequence to final orders and plans without a public hearing.
2. Subtitle Z § 703.3 defines a Modification of Consequence as “a modification to a contested case order or the approved plans that is neither a minor modification nor a modification of significance.”
3. Subtitle Z § 703.4 includes “a proposed change to a condition in the final order” as an example of a Modification of Consequence.
4. The Commission concludes that the Application qualifies as a Modification of Consequence within the meaning of Subtitle Z §§ 703.3 and 703.4, as a request to modify conditions in the Order, and therefore can be granted without a public hearing pursuant to Subtitle Z § 703.17(c)(2).
5. The Commission concludes that the Applicant satisfied the requirement of Subtitle Z § 703.13 to serve the Application on all parties to the original proceeding, in this case ANC 5E and Ms. Konkel.
6. The Commission determines that because OP and ANC 5E, had filed responses to the Application, and because Ms. Konkel did not respond within the time frame established pursuant to Subtitle Z § 703.17(c)(2), that the Commission could consider the merits of the Application at the July 29, 2019 public meeting.
7. The Commission finds that the modification proposed by the Application is consistent with the PUD approved by the Order because the Application only proposes to modify apportionment of the financial contribution between two uses approved by the Original Order.

“Great Weight” to the Recommendations of OP

8. D.C. Official Code § 6-623.04 (2018 Repl.) and Subtitle Z § 405.8 require the Commission to give “great weight” to the recommendations contained in the OP Report.
9. The Commission found OP’s recommendations that the Application qualified as a Modification of Consequence and that the Commission approve the Application persuasive and concurred in that judgment.

“Great Weight” to the Written Report of the ANC

10. D.C. Official Code § 1-309.10(d)(3)(A) (2012 Repl.) and Subtitle Z § 406.2 require the Commission to give “great weight” to the issues and concerns contained in the written report of an affected ANC. To satisfy this great weight requirement, District agencies must articulate with particularity and precision the reasons why an affected ANC does or does

not offer persuasive advice under the circumstances. The District of Columbia Court of Appeals has interpreted the phrase “issues and concerns” to “encompass only legally relevant issues and concerns.” (*Wheeler v. District of Columbia Board of Zoning Adjustment*, 395 A.2d 85, 91 n.10 (1978).)

11. The Commission found ANC 5E’s support for the Application persuasive and concurred in that judgment.

DECISION

At its public meeting on July 29, 2019, in consideration of the case record and the Findings of Fact and Conclusions of Law herein, upon the motion of Chairman Hood, as seconded by Commissioner Shapiro, the Zoning Commission for the District of Columbia **ORDERS APPROVAL** of a Modification of Consequence to the PUD approved in Z.C. Order No. 12-02, subject to the following condition by a vote of **5-0-0** (Anthony J. Hood, Robert E. Miller, Peter A. Shapiro, Peter G. May, and Michael G. Turnbull to approve).

The conditions in Z.C. Order No. 12-02, remain unchanged, except as that Condition No. B.4. is revised to read as follows (additions in **bold and underlined** text; deletions in **~~bold and strikethrough~~** text):

- B.4. Prior to the issuance of a certificate of occupancy for the building, the Applicant shall submit to the Department of Consumer and Regulatory Affairs (“DCRA”) evidence that:

- ~~a. The Applicant provided \$220,000 to Cultural Tourism DC for the development and installation of eight signs for an Eckington Heritage Trail in the neighborhood.~~

- ~~b.a.~~ The Applicant **has** paid a contractor or otherwise incurred costs of **up to** \$65,000 for the **permitting**, fabrication, and installation, **and has commenced the installation**, of three-sided perimeter tree enclosures ("commonly referred to as "tree boxes") and mulch at the locations on the north and south sides of Q Street, **Quincy Street**, and R Street, N.E. between North Capitol Street and Eckington Street **for those properties whose owners have provided the requisite fully-executed and notarized maintenance covenant**;

- ~~b.~~ **The Applicant has provided \$220,000 to Cultural Tourism DC, in addition to any unspent portion of the \$65,000 allocated to tree boxes and mulch, for the development, fabrication, and installation of at least eight signs for an Eckington Heritage Trail in the neighborhood of the PUD Site; and Cultural Tourism has developed or installed these signs or is in the process of doing so.**

- c. ~~The eight heritage trail signs have been installed or are in the process of being developed and that the tree boxes and mulch.~~ **The Applicant's total contribution for the tree boxes, mulch, and heritage trail signs shall be \$285,000.**

In accordance with the provisions of Subtitle Z § 604.9 of the Zoning Regulations, this order shall become final and effective upon publication in the *D.C. Register*; that is, on August 23, 2019.

BY ORDER OF THE D.C. ZONING COMMISSION

A majority of the Commission members approved the issuance of this Order.



ANTHONY J. HOOD
CHAIRMAN
ZONING COMMISSION



SARA A. BARDIN
DIRECTOR
OFFICE OF ZONING